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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of CHARLES and EDIT
HOOD.

CHARLES HOOD,

Appellant,

v.

EDIT GONZALEZ-HOOD,

Respondent.

D047977

(Super. Ct. No. DS22288)

APPEAL from a judgment of the Superior Court of San Diego County, Gerald C. Jessop, Judge. Affirmed.

In this marital dissolution action between petitioner/appellant Charles Hood and respondent Edit-Gonzalez Hood, Charles appeals from "the statement of decision and order entered on December 6, 2005," which was a supplemental judgment that in part denied him reimbursement for certain payments and contributions, and characterized his

bank accounts as community property.¹ Charles contends he was denied due process when the trial court excluded "relevant documentary evidence because the documents had not been attached as exhibits to [his] settlement brief as required by the Local Rules." We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 13, 2002, Charles filed a petition to dissolve his and Edit's two year, seven month marriage.² After numerous hearings and orders regarding the parties' various properties, an uncontested judgment was entered dissolving the status of the marriage as of December 9, 2004, with the court retaining jurisdiction over all other issues. On February 24, 2005, the parties attended a mandatory settlement conference regarding the matters, each filing mandatory settlement briefs in support of their respective positions. When the bifurcated matters did not settle, the case proceeded to trial. In their respective mandatory trial briefs, the parties identified at issue, among other things: the characterization and division of two pieces of real property in Indiana and Illinois which Charles had had before the marriage; the characterization and community property interests in the San Diego County property referred to as the Auburn Street (Auburn) investment property; reimbursement issues of both parties; *Epstein* credit

¹ For purposes of clarity and not out of disrespect, we refer to the parties by their first names.

² In her responsive papers, Edit claimed the marriage lasted two years, nine months.

claims by both parties³; characterization or ownership of a Dodge truck; characterization and division of Charles's bank accounts; division of the parties' 401-K accounts; claims of breach of fiduciary duty to Edit; and attorney fees. Edit essentially claimed that the Auburn property and truck were her separate property, and that two of the out-of-state properties and Charles's bank accounts should be considered community property.

In limine, Edit filed a motion to exclude Charles's documentary evidence in support of his *Epstein* credits and Family Code section 2640 reimbursement claims. Edit argued that because Charles had not complied with San Diego County Local Rules 5.14G and 5.14H, which respectively require a party claiming *Epstein* credits and seeking statutory reimbursement to fully disclose all documentary evidence at the mandatory settlement conference by attaching all documents to be used at trial in support of such claims, he should be precluded from presenting "four exhibits which were not attached to or lodged with the brief served on [her]."

At the hearing on the matter, Charles's trial counsel conceded there was no evidence before the court as to whether or not the receipts and documentary evidence to support reimbursement claims or *Epstein* credits were "in fact attached to the settlement conference brief with [Charles's] former attorney." Counsel argued that the local rules allowed the admission of such documents for "good cause," that Charles should not be penalized because there was a possibility of their omission, and that the documents

³ Credits for separate property spent after separation on community obligations under the guidelines set out in *Marriage of Epstein* (1979) 24 Cal.3d 76, 84-85 (*Epstein*).)

should nonetheless be allowed to refresh Charles's memory "while he's testifying even if those documents are not admitted into evidence."

Edit's counsel objected that there were no exhibits attached to the mandatory settlement brief and that the four exhibits listed in the settlement brief did not reference any documentary material which would relate to *Epstein* credits or Family Code section 2640 reimbursements. Edit's counsel further objected to the use of the exhibits to refresh Charles's memory.

After granting Charles's attorney's request to take judicial notice of Charles's settlement conference brief, the court inquired as to what his argument was based upon. Charles's counsel responded that because "No. 2" on page 2 of the settlement conference brief identified "separate property reimbursements and *Epstein* credits, that is a reference to these documents that was in the settlement conference brief." Counsel asserted the exhibits should be admitted based on such reference which put the parties on notice that the documents would be used to support such claims.

When the court then asked, "[t]hat's a fairly large cow pasture, though, isn't it?," counsel responded, "It is a large cow pasture, but the point is that that's in the settlement conference brief; the other side knows it's an issue. We have an experienced attorney here. So many lawyers back down the line, [the exhibits] could . . . have been either attached or they could have been just handed to [Edit's] attorneys at the settlement conference."

The court then noted that on page 14 of the settlement brief under reimbursements there was a reference to "an exhibit D. What is that? There is no exhibit D attached to

the brief." Edit's counsel explained that his understanding was that exhibit D referred to a summary prepared by Charles of rents in the amount of \$64,000 that Edit purportedly collected on the Auburn property after the date of separation, but noted that such exhibit had not been attached or provided as required by the local rules. The court also noted that exhibit D was not attached to the copy provided the court for this motion.

After Charles's counsel submitted the matter, the trial judge ruled he was sticking with his tentative, stating:

"I think local rules are fairly clear that the supporting documents need to be attached to the brief to allow parties to make their respective arguments. And I think that would handicap and cause a trial by ambush insofar as the parties need to be presenting all of their evidence to effectively enter into settlement negotiations, and if those documents aren't brought to the floor at that time, the parties can't possibly come to a settlement. [¶] The local rules are fairly clear, and that is that those claims must be fully documented. Our tracing statute certainly provide[s] for a complete detailed tracing of reimbursement claims, so I'm going to exclude the documents. [¶] Now, the next issue was [Charles's attorney's] request to refresh [Charles's] recollection. The local rules do not exclude that issue as a sanction, and consequently [Charles] may testify as to his recollection of these transactions."

When Charles's counsel interrupted to say he did not intend to have Charles go through every single receipt to see if it refreshed his memory, but just to give a summary of what he had done, the court asked how he could directly trace if he just does that. The court advised counsel that it might help to have offers of proof regarding Charles's claims to reimbursement and clarified it was not excluding testimony explaining the documentation for Charles's claims.

Before testimony was taken at trial on August 29, 2005, the parties each waived any claim to spousal support, and stipulated that all out-of state properties, except for two, were the separate property of Charles, that the home at 478 Satinwood Way was Charles's separate property and that the home at 1503 Satinwood Court was community property. Charles then testified extensively about his experience as a loan originator and real estate agent, about his marriage to Edit, about their agreement to invest in real property for their retirement, about how he helped find the Auburn property as an investment which was then purchased in Edit's name, about his various bank and investment accounts, out-of-state properties, and the truck purchase and use. Over Edit's counsel's objection to exclude any testimony regarding credits and reimbursement, Charles was permitted to testify about the various amounts of money he claimed he had used from his separate accounts to pay community property bills since the parties had separated.

On cross-examination, Charles conceded that he had signed an interspousal transfer deed regarding the Auburn property titled in Edit's name, that the rents he had received during marriage from his separate property holdings had been put in a variety of bank accounts, including some joint with Edit, some in her separate accounts and some in his separate accounts, and that different property mortgages, expenses and taxes were paid out of the various accounts. Before resting his case, Charles also presented two witnesses who testified in support of his position that the nature of the Auburn property was community property.

In addition to Edit testifying as to her position, her sister and a cousin each testified in her support. The cousin discussed a loan transaction with Edit which resulted in his paying \$6,000 or \$7,000 back to Charles. Edit's sister testified that she had lived with the couple for a period of time, that they argued daily about Edit needing to sign certain documents, and that Charles had abused Edit on one occasion by throwing a towel at her and pushing her.

Essentially, Edit testified about agreeing to marry Charles so he could have health insurance in exchange for her having a piece of investment property with the pre-approved loan she had and about helping Charles refinance his Indiana property so he could get \$38,684 to pay off his credit card debt, with him putting her name on two properties during the marriage, but then harassing her and her daughter until she signed the properties back to him with no consideration. Near the end of the day, when time conflicts arose, the court adjourned the trial and continued the matter to September 20, 2005.

Finally, on November 18, 2005, the trial resumed with Edit testifying in more detail about the various moneys used for the truck and properties in contention at trial, about how title was held on those properties and on different accounts, and about her various investment agreements with Charles.

Charles then testified in rebuttal, attempting to refute Edit's testimony and to enter into evidence a folder of files as exhibits that were compiled by Charles's counsel between the first part of trial and this second part in response to what Edit had testified

about in the first segment. The court sustained Edit's counsel's objections to the admission of the exhibits.

At the end of the parties' respective closing arguments, the court asked for clarification on certain reimbursement issues and obtained stipulations on matters the parties had agreed upon. After the court accepted stipulations regarding the various 401-k retirement accounts, it ruled and confirmed that the Auburn property was Edit's separate property. The court then addressed the two subject out-of-state properties. Finding undue influence and breach of fiduciary duty by Charles in the second transaction involving the deletion of Edit's name from those properties, the court determined those properties were community property and ordered Edit's name be added to the deeds, the properties sold and the proceeds divided between the parties after Edit was charged with her share in all expenses and Charles accounted for all the rents. The court denied Edit's request for reimbursement for the \$38,000 involved in that transaction. The court also ordered the community property at 1503 Satinwood to be sold and divided in similar fashion. The court additionally found that the truck was Edit's separate property and denied Charles's request for any Family Code section 2640 reimbursement with regard to the truck. The court took the remaining issues under submission so that it could review the testimony.

On December 6, 2005, the court filed its Supplemental Tentative Judgment, which provided in the part relevant to Charles's claims for reimbursement, *Epstein* credits, and the characterization of his bank accounts:

"1. Reimbursement for tax payments. [Charles] requested reimbursement for \$1,228 in his separate property funds which he used to pay taxes on community property. [Charles] testified that he paid property taxes of approximately \$2,500 and \$1,400 or \$1,500. He never identified which piece of "community property" benefited from these payments. The payment amount does not match any testimony received by the Court during the trial. This tracing is insufficient to support this request. The Court denies this request based upon a failure of proof. [¶] 2. Reimbursement of Auburn mortgage payments. [Charles] requested reimbursement of \$5,800 for funds he used to make the mortgage payments on the Auburn property. Here, like the earlier request, there is a failure of proof. A review of the transcript fails to reveal testimony regarding the sum of \$5,800. [Charles's] request is denied. [¶] . . . [¶] 6.

Characterization and Division of [Charles's] Bank Accounts During marriage [Charles] held a General Power of Attorney (Exh B) dated January 26, 1999 for [Edit]. This general power did not release him from his fiduciary obligations to [Edit.] Contrary to [Charles's] testimony, he repeatedly transferred funds derived from [Edit's] separate property into accounts standing in his own name. These deposits included three deposits on June 26, 2001, July 24, 2001 and October 10, 2001 in the amounts of \$3,700, \$2,400 and \$1,000, respectively, into the Tech Credit Union Account standing in his name, Account #91460 (Exhibit HHH). [Charles] transferred \$8,000 and \$6,000 on October 15th and October 16th, respectively (Exh GGG) from the Mission Federal Credit Union standing in the parties' joint names, account 12127449 into the Mission Federal Credit Union Account standing in his name alone, Account 360001841. Furthermore, after [Edit] refinanced her separate property Dodge Truck in May 26, 2000 (Exh PP), [Charles] transferred \$3,600 of the \$5,985.33 proceeds into this University and State Employees Credit Union Account, account number 0013313109 which was later deposited into the stock margin account at Charles Schwab, account number SD4464-9998 standing in [Charles's] name. (Exhibit FFF) The deposit of \$3,600 was contrary to [Edit's] instructions to [Charles]. [Edit's] direct tracing of these funds is contrary to [Charles's] testimony. [Charles] testified that he only made one such transfer into this personal account[.]. [He] testified that he had only one Tech Credit Union Account, yet [Edit] clearly established that he had at least two or three accounts at that institution. [Charles] was not [credible]. [¶] Based upon the testimony, the Court grants [Edit's] request to characterize the Tech Credit Union Account #9166011, Mission Federal Credit Union Account #36001841 and

the University and State Employees Credit Union Account #0013313109 and Charles Schwab Account #SD4464-9998 as community property. [(Fam. Code § 1101, subd. (c); *Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 715.)] Each party is awarded one-half of the balances of the proceeds in those accounts as of the date of separation. [¶]7. Reimbursement for separate property contributions to 1503 Satinwood Ct. [Charles] requests reimbursement for his separate property contributions to the acquisition of 1503 Satinwood Ct. This property is characterized as community property of the parties. However, during the trial, [Charles] testified that he was not sure of the exact amount of his separate property contribution to the acquisition of this property. He testified that he "thought" it was \$11,000. This request is further complicated by the fact that [Charles] testified that he refinanced this property since the date of separation. There must be sufficient evidence presented to support an adequate tracing of funds to warrant reimbursement. [(*In re Marriage of Mix* (1975) 14 Cal.3d 604, 612.)] [Charles's] equivocal testimony regarding the \$11,000 is not sufficient. The Court denies his request for reimbursement. . . ."

DISCUSSION

Charles does not challenge the sufficiency of the evidence to support any of the trial court's rulings. Nor does he challenge the trial court's in-court rulings made November 21, 2005. Rather his sole contention on appeal from the court's December 6, 2005 supplemental judgment is that the trial court denied him due process when it ruled he could not present his documentary evidence in support of his reimbursement and *Epstein* credit claims, which he had failed to attach to his settlement brief as required by the local rules. He argues such ruling prejudiced him because it "resulted in several rulings that his tracing was insufficient."

Charles, however, has failed to provide this court with an adequate record to determine whether reversal of the judgment on due process grounds is appropriate. (See *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575.) Not only does the record on appeal not

contain the purported exhibits or documentary evidence that Charles wanted admitted at trial, the settlement conference brief in which they were supposedly referenced is also not part of the record.

We have searched the record provided for our review and have found no competent evidence or offer of proof as to what exhibits or documents Charles sought to have admitted or how they would be relevant to *Epstein* credits, reimbursements, or the tracing of monies in Charles's bank accounts. The only clue provided below was by Edit's counsel during the in limine motion as to what he thought an exhibit D concerned, but all parties agreed such exhibit was not attached to the settlement brief or provided the court for the motion. On this barren record, we have no way of ascertaining whether it is reasonably probable that the admission of the purported documentary exhibits would have helped Charles in his tracing or claims in this case, and note our sympathy with the trial judge who appears to have made its determination in a similar void.

Moreover, although the court ruled the exhibits and documentary evidence could not be admitted, the record clearly shows it did not prohibit their use by Charles to refresh his memory as he testified. Nor did the court's ruling preclude Charles from testifying as to the specifics of his various claims or rebutting Edit's testimony regarding those claims.⁴

⁴ Edit's responsive brief credits Charles with contending that the local rules the court used to deny his request to admit certain exhibits and documentary evidence are unconstitutional on their face or as applied to him. We can find no such constitutional challenges raised in Charles's brief and do not consider his bare assertion that the court's ruling denied him due process does so.

It is well established that "[t]he trial court's judgment is presumed correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. [Citation.]" (*In re Marriage of Nichols* (1994) 27 Cal.App.4th 661, 670.) Because of this presumption, a party challenging such judgment has the burden of providing an adequate record to overcome the presumption and to show reversible error. (*Ballard v. Uribe*, *supra*, 41 Cal.3d at pp. 574-575.) Because Charles has failed to provide such a record, we decline to further address the merits of his appeal.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

McINTYRE, J.

AARON, J.